Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Fritz E. Attaway
Frances Seghers
MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-1966

Michael D. Berg
Michael S. Ray
AKIN, GUMP, STRAUSS, HAUER &
FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

February 16, 1993

TABLE OF CONTENTS

REPLY COMMENTS OF THE
MOTION PICTURE OF AMERICA, INC.
MM DOCKET NO. 92-265

SUMMARY

In opening comments in this proceeding, the Motion Picture Association of America, Inc. ("MPAA"), which had been a major proponent of new Section 616 of the Communications Act, stressed the importance of Congressional intent as the guiding force for FCC implementation of the Section. That intent is to deter, and to remedy, the coercion of financial interests or exclusive rights in programming services as a condition of their carriage by multichannel video programming distributors ("MVPDs"), and to deter and remedy discrimination against programmers unaffiliated with the MVPD in the terms and conditions of carriage.

In these Reply Comments, MPAA refutes four recommendations in the opening comments of other parties which, if implemented, would undermine Congressional intent and preclude effective implementation of Section 616. MPAA demonstrates that each of the contentions lacks merit and must be rejected, as follows:

1) Section 616 does not prohibit only coercion or conditioning of carriage which involves explicit threats or intimidation, as Telecommunications, Inc. (TCI) incorrectly suggests. Congress refrained from specifying the particular conduct that Section 616 prohibits, and did not require the Commission to do so. Instead, Section 616 clearly provides for case by case adjudication of complaints, and determinations of coercion and conditioning based on the totality of circumstances of which explicit threats or intimidation may be, but need not be, a part.

2) Section 616 requires evidence-based case by case determinations, independent of those under Section 628, with respect to coerced financial interests or exclusivity and discrimination against unaffiliated program vendors. The two sections have distinct goals, and Section 628 criteria cannot therefore be engrafted onto Section 616 procedure as Continental Cablevision suggests. For example, coerced exclusivity and financial interests are illegal and remediable under Section 616, regardless of whether an agreement also violates separate Section 628. For Section 616, the proffered presumptions of validity based on factors meant for another purpose, determinations of "deficiency" of programming vendors based on unknown criteria, and similar suggestions would lead the Commission down a wrong and needlessly complex path.

3) Contrary to the suggestion of Continental Cablevision that mandatory carriage should rarely be ordered even for clear violations of Section 616, comparable carriage on equivalent terms (such as channel and tier placement) will be essential to an adequate remedy in many cases. The statute requires provision in Commission rules for both penalties and remedies. Remedies are directed to the victims of the proscribed behavior: the programming vendor who is out of business without carriage, and the public deprived of diversity and choice without carriage.

4) Threshold tests of the "plausibility" of coercion, as suggested by Cablevision Industries Corporation, cannot and should not be seriously considered. Summary dismissal of complaints based on pre-evidence, subjective determinations of "plausibility" are inconsistent with the intent of Section 616 and with due process. Any programming vendor can be coerced when no comparable MVPD is available. Sanctions for frivolous complaints suffice to deal with "plausibility."

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA")1/, by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415 (1991), submits these reply comments in response to certain opening arguments of other parties, and in accord with the Commission's Notice of Proposed Rulemaking2/ in this proceeding.

As indicated in MPAA's opening comments filed January 25, 1993, in this proceeding, MPAA member companies are "video

---

1/ MPAA represents the seven leading United States producers and distributors of motion picture and television programming. This reply represents the positions of Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment, Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; and Universal Studios, Inc. Warner Bros, a division of Time Warner Entertainment Company, L.P. ("Time Warner") does not join in positions taken in these Reply Comments, and is filing its own reply in this proceeding.

2/ Notice of Proposed Rulemaking, 8 FCC Rcd 194 (1993) ("Notice").

programming vendors" under the 1992 Cable Act ("Act")3/ who produce video programming exhibited through multiple outlets, including cable television systems and other types of multichannel video programming distributors (hereinafter collectively "MVPDs"). As both licensors and owners of programming services, MPAA members seek to promote a robust, diversified and competitive distribution marketplace with multiple outlets.

To this end, MPAA was a principal proponent of the enactment of Section 616 of the Communications Act (added by Section 12 of the 1992 Cable Act), and in opening comments made specific recommendations for its effective implementation by the Commission.4/ Among other points, MPAA opening comments stressed that implementation of Section 616 must be driven by Congressional intent to (1) deter and (2) remedy the coercion of financial interests or exclusive rights as conditions for carriage, and discrimination against unaffiliated programmers in carriage terms and conditions. In these Reply Comments, MPAA responds to four specific contentions of other opening commenters

---

3/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 12, 106 Stat. 1460, 1488 (1992).

4/ Section 616 prohibits and provides for remedies for (1) coercion of financial interests or exclusive rights in programming as a condition of carriage and (2) discrimination in the terms and conditions of carriage against programmers unaffiliated with the MVPD. The Commission's task in this proceeding is to adopt and implement regulations to carry out these purposes. Regarding Section 628, MPAA opening comments also stressed the legitimacy and public benefits of exclusive rights that are not coerced.

which, if adopted by the Commission in this proceeding, would frustrate that intent.

I. Section 616 Does Not Require a Showing of Explicit Threats or Intimidation, Nor Should Its Implementation

According to the opening comments of Tele-Communications, Inc. ("TCI"), "the 'conditioning' and 'coercion' standards of Section 616(a)(1) and (2) require a showing of explicit threats or intimidation in order to render conduct illegal." TCI Comments, pp. 33-36. For multiple reasons, this contention is wrong, and the Commission should reject it.5/

First, the proposal is illogical and inconsistent with the intent of Section 616. It is of course true that the Act does not make either financial interests or exclusive contracts "per se illegal." TCI Comments, p. 34; accord, MPAA Comments, p. 6. But it does not follow from this that coercion of financial interests or exclusivity as conditions for carriage can or does occur only when there are explicit threats or intimidation. To the contrary, and as is to be expected, industry experience teaches that explicit threats and intimidation are relatively rare, which is likely to continue now that coercion is prohibited by statute. Far more often, coercion is in the totality of the circumstances of the dealing between the programming vendor and the only MVPD available to it.

5/ MPAA notes TCI's suggestion that its approach also be applied to "undue influence" determinations under Section 628. In these Reply Comments, MPAA limits its attention to that aspect to observing that it appears to be misguided.

In enacting Section 616, Congress found that the proscribed coercion is widespread enough to warrant a separate section of the Act. See S. Rep. No. 102-92, 102d Cong., 2nd Sess. 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1212 ("This new section requires the FCC to adopt regulations, within one year of enactment, governing program carriage agreements between cable operators and video programmers"). Nowhere in the Act or legislative history is there any indication that Congress sought to address only explicit threats or intimidation, which Congress could have done if it so desired. Instead, Congress declined to require the Commission to specify the particular conduct that Section 616 prohibits (in contrast to Section 628, which does so require; (MPAA Comments, p. 7)), and provided for case-by-case adjudication of complaints. Rules making Section 616 unavailable except in the most unusual instances of the proscribed conduct would nullify the intent of the statute.

Second, TCI provides no valid support for its proferred approach. The antitrust tying arrangement cases cited by TCI are inapposite to Section 616, and TCI's discussion of them is incomplete. Except in one case where a particular statute required explicit threats, 6/ none of the cited cases turned on the presence or absence of explicit threats or intimidation. In addition, TCI's own description of the cited cases (at pp. 35-36

6/ Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1038 (5th Cir. 1981) cert. denied, 454 U.S. 860 (1981). (Automobile Dealers' Act, unlike Section 616, required intimidation or threats as elements of actionable coercion).

of its Comments) shows why they are inapposite: their holdings of "no coercion" are premised upon the existence of "alternative sources;" retention by franchisees of "ultimate choice;" lack of proof that a purchaser "was foreclosed from shopping around;" and a complainant's freedom "to refuse the offer." TCI Comments, p. 35. In contrast, Section 616 is premised upon Congress' finding that the absence of alternative MVPDs is the general rule. This distinguishes Section 616 cases from those cited by TCI, and renders them irrelevant to the Commission's rules for Section 616.

Even if the cited tying arrangement cases were on point, it would be necessary to balance them against other similar cases decided in other circuits in which coercion was found in the absence of explicit threats or intimidation. See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co., 815 F. 2d 1407, 1416-17 (11th Cir. 1987) (coercion shown by a general understanding through years of dealing with defendants); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1212, 1216-17 (9th Cir. 1977) (coercion may be implied from a showing that an appreciable number of buyers accepted burdensome terms and sufficient economic power exists in the tying product market); Klo-zik Co. v. General Motors Corp., 677 F. Supp. 499 (E.D. Texas 1987) (Fifth Circuit requires plaintiff to show that purchase of the tied product resulted from actual coercion stemming from defendant's market power).

Antitrust cases which appear to have greater relevance to Section 616 than the cited tying arrangement cases apply the

"essential facilities" doctrine. For example, in Otter Tail Power Co v. United States, 410 U.S. 366 (1973), the Supreme Court held that a wholesale supplier of electricity was liable for its refusal to supply power to a competing system where that retail system had no other source of supply and the electrical transmission lines were an essential facility. In Aspen Highlands Skiing Corp. v Aspen Skiing Co., 738 F.2d 1509, 1520-21 (10th Cir. 1984), aff'd, 472 U.S. 585 (1985), the Tenth Circuit held that a facility is "essential" if competitors cannot effectively compete in the relevant market without access to it.

Even useful antitrust models, however, are not a substitute for the case-by-case adjudication required of the FCC by Section 616. This is plain from the language of the Section itself, and from separate Section 27 of the Act. There Congress expressly provides that Federal and State antitrust law remain available independent of the Cable Act. Cable Act of 1992, Pub. L. No. 102-385, § 27, 106 Stat. 1460, 1503.

Evidence of explicit threats or intimidation, then, is not necessary at all to relief under Section 616 or its implementing rules, and coercion and discrimination must be determined from the total circumstances. The proper role of evidence of explicit threats or intimidation is not as a litmus test or threshold bar to complaints, but as part of the total evidence to be considered in individual cases along with the factors recommended by MPAA (MPAA Comments, pp. 7-9), and any other factors which arise (and which need not and cannot all be identified now). It is in this

case-by-case way that the presence or absence of coercion and conditioning must be determined.

II. Section 616 Requires Determinations of Coercion and Discrimination Independent of Section 628

Paragraph 56 of the Notice in this proceeding notes a relationship between Sections 616 and 628, and indicates the Commission's "belief" that "Section 616 must be read together with Section 628(c), which limits certain exclusive arrangements and establishes standards for determining whether exclusive contracts are in the public interest." In response, Continental Cablevision, Inc. ("Continental") suggests in its opening comments that in making determinations on complaints under Section 616(a) "the Commission look to consider the same factors that Congress listed in Section 628(c)(2)(B) that would justify programmers treating different distributors differently (e.g., creditworthiness, service offering financial stability, character, and technical quality). If a programmer is deficient in any one of these areas, the distributor's decision not to carry its services should be deemed presumptively valid and the remedy of mandatory carriage not available." Continental Comments, pp. 25-26.

Though there is some overlap between the sections (for example, each restricts the granting of exclusive rights in certain circumstances), the focus and main purpose of each section are distinct. In essence, Section 616 addresses abuses of programmers by multichannel video distributors, and Section

628 addresses the availability of programming to multichannel competitors of cable television systems. Too close a "reading together" of the sections, such as that recommended by Continental, would prevent the Commission from fulfilling its obligations under Section 616.

Section 616 prohibits two types of conduct: coercion of financial interests or exclusive rights as conditions for carriage, and discrimination in carriage terms and conditions against program vendors unaffiliated with the multichannel distributor in question. Whether such conduct has occurred, and the appropriate remedy if it has, must be determined based upon the facts of each case.

Under Section 616, exclusivity and financial interests are prohibited and remediable if coerced. If coerced, exclusivity is not in the public interest because it is prohibited by Section 616, without reference to Section 628. Coerced exclusivity is illegal, regardless of how the agreement of which it is a part might be evaluated under the public interest criteria for exclusive contracts in Section 628. The 628 criteria have a different goal: assuring the availability of programming to competing delivery systems without unduly restricting otherwise legitimate business arrangements.

For these reasons, it is inappropriate to establish certain of the "apple" criteria of Section 628 as threshold bars or presumptions for the "orange" determinations required by Section

comments in effect demonstrate. Apparently under its recommendation, any of the conduct prohibited by Section 616(a)--coercion of financial interests or exclusive rights in exchange for carriage, or discrimination in the terms and conditions of carriage on the basis of affiliation or non-affiliation of vendors--would be "presumptively valid" if, for example, a programmer were "deficient" (as determined by whom and under what criteria?) in creditworthiness, "character" or other factor.

For Section 616, the only proper role of evidence of such factors is the same as the role, discussed above, of evidence of explicit threats or intimidation. For example, if a distributor can show that it denied or conditioned carriage based upon concerns about creditworthiness, that evidence is to be weighed, along with other evidence, as part of the case-by-case determination that Section 616 requires. Presumptions of validity based on factors meant for another purpose, determinations of "deficiency" of programming vendors based on unknown criteria, and similar recommendations would lead the Commission down a wrong and needlessly complicated path.

III. Mandatory Carriage Will Often Be The Most Effective Remedy

Because of the current absence of alternative multichannel distributors in most markets, and the inability of a programming vendor to do business in such a market without carriage, comparable carriage on equivalent terms (such as channel and tier placement) will in many cases be essential to an adequate remedy.

Continental contends that "[e]ven in the face of wrongful conduct by a cable operator, the mandatory carriage remedy should be applied only in rare cases," partly because "forced carriage" without exclusivity is "financially more severe than a fine". Continental opening comments, p. 27. This type of argument confuses penalties and remedies. These are different, and the Commission must provide for both under Section 616(a)(5).

Penalties are directed to the perpetrators of prohibited coercion or discrimination. Remedies are directed to their victims: programming vendors who are out of business if denied carriage unfairly, and the viewing public that is deprived of the program diversity and choice which only carriage can restore.7/ The denial or conditioning of carriage is central to the violations described by Section 616(a)(1), (2) and (3). At least until there are more alternative multichannel disbributors, "appropriate remedies" for these violations will often have to assure that programming distribution occurs after it has been improperly blocked or conditioned.

As suggested in MPAA's opening comments, when carriage is ordered, it should be for a reasonable period on nondiscriminatory terms until the parties notify the Commission that they have reached an agreement. MPAA Comments, p. 13.

7/ "Programmers either deal with [sole MVPDs] on their terms or face the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between the content provider and the consumer." S. Rep. No. 102-92, 102 Cong., 1st Sess., 24 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1157.

IV. The Commission Should Adopt No Threshold "Plausibility" Test of Coercion

Cablevision Industries Corporation and others ("Cablevision") urge a 3-part test for Section 616 coercion or retaliation. The first part would require complainants as a threshold matter to establish that coercion or retaliation is "plausible" in a theoretical sense between the parties. If the programmer were found to be too powerful (under unspecified criteria) to be coerced plausibly, the complaint would be summarily dismissed regardless of other evidence. Cablevision Comments, pp. 23-24. Under this approach, complaints would apparently be disposed of summarily based upon subjective conclusions about the mere identity of the parties.

This suggestion cannot and should not be taken seriously. Plausibility is a question of fact to be adjudicated based upon evidence. Any programming vendor can be coerced when no comparable alternative multichannel distributor is available. All complainants are entitled to due process and equal protection of the laws, as are those complained against. No criteria are suggested for defining the circumstances of threshold implausibility, and it would be a misuse of Commission resources to develop any.

In addition, Section 616 requires sanctions for frivolous complaints. This should be sufficient to deal with implausibility in a manner consistent with due process and Congressional intent to proscribe and remedy the conduct addressed in Section 616.

V. Conclusion

In opening comments MPAA urged the Commission to be guided in all its decisions concerning Section 616 implementation by Congressional intent to prohibit, deter and remedy the proscribed conduct. For the reasons described here, each of the proposals replied to in this pleading would have the Commission undermine that intent, and should therefore be rejected.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: Michael D. Berg

Michael D. Berg
Michael S. Ray
AKIN, GUMP, STRAUSS, HAUER &
FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Its Attorneys

Fritz E. Attaway
Frances Seghers
MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-1966

February 16, 1993

CERTIFICATE OF SERVICE

Courtesy copies of the foregoing "Reply Comments of the Motion Picture Association of America, Inc." have been sent this date by first class mail, postage prepaid, to the following:

Michael H. Hammer, Esquire
Philip L. Verveer, Esquire
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3302

Attorneys for Tele-Communications, Inc.

Frank W. Lloyd, Esquire
Keith A. Barritt, Esquire
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Attorneys for Continental Cablevision, Inc.

Brenda L. Fox, Esquire
David J. Wittenstein, Esquire
Michael J. Pierce, Esquire
DOW, LOHNES & ALBERTSON
1255 - 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Attorneys for Cablevision Industries Corporation, et al.